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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

)
Amendment of the Commission's Rules to)
Establish Part 27, the Wireless)
Communications Service ("WCS"))

GN Docket No. 96-228

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Comments
of the
Competition Policy Institute

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Summary

CPI is a non-profit organization that advocates state and federal regulatory policies to bring competition to energy and telecommunications markets in ways that benefit consumers. CPI believes that competition in telecommunications will lead to reduced regulations, new technologies, higher service quality, and lower prices for consumers.

CPI believes that the FCC's tentative proposal to allow WCS licensees to have the flexibility to provide a variety of services may have some consumer benefits. For the Commission to limit the scope of services that could be provided using this spectrum might unduly limit the number and type of services that could be provided in an efficient manner over this spectrum, with a resulting loss of consumer welfare.

At the same time, the Communications Act imposes some constraints on the FCC's authority to allow greater spectrum flexibility. The Commission must ensure that the WCS provider does not own the spectrum and is accountable to the general public and the FCC. The Commission should not delegate its public interest responsibilities completely to private entities. The Commission may not design the rules for WCS licenses solely to maximize auction revenues. The Commission should analyze the effect of its WCS rules on competition in those markets offering services similar to those that could be offered using the WCS spectrum. Only by conducting such an analysis of each of the industries that are potentially implicated by WCS can the Commission ensure that competition is enhanced. Finally, the Commission should examine closely its ownership eligibility restrictions and the applicability of the spectrum "cap" to the WCS licensee. The FCC must ensure that its policies are fair and competitively neutral. Only then will the FCC have satisfied its obligation to award licenses in the public interest.

COMMENTS OF THE
COMPETITION POLICY INSTITUTE
CONCERNING THE NEW WIRELESS COMMUNICATIONS SERVICE

GN Docket No. 96-228

The Competition Policy Institute (CPI) submits these comments in response to the Commission's Notice of Proposed Rulemaking in GN Docket No. 96-228 concerning the new Wireless Communications Service ("WCS").

CPI is an independent, non-profit organization that advocates state and federal regulatory policies to bring competition to energy and telecommunications markets in ways that benefit consumers. CPI believes that competition in telecommunications will lead to reduced regulations, new technologies, higher service quality, and lower prices for consumers.

I. Introduction

This proceeding provides an opportunity for the Federal Communications Commission (FCC or Commission) to develop policies that promote the efficient provision of new, competitive services for consumers. In crafting the rules for this service, the Commission should keep the interests of consumers at the forefront of its deliberations. The Communications Act (the Act) requires the Commission to award licenses to use the spectrum under the public interest standard.¹ While the public interest standard vests the Commission with considerable discretion to determine the type, frequency and geographic area of each license, the Commission's ultimate goal should be to ensure that the usage of the spectrum benefits consumers.

¹ Section 307(a) states, "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefore a station license provided for by this Act." Section 309(a) states, "Subject to the provisions of this section, the commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application. . ."

II. The Commission's Legal Authority to Allow Spectrum Flexibility.

While the Communications Act does not define the public interest standard, it does include several provisions to guide the Commission's use of that standard. First of all, the Act prohibits the FCC from granting licensees ownership of the spectrum.² The spectrum belongs to the public, not to any individual licensee, and the Act simply permits licensees to use the spectrum on behalf of the public. The policy that licensees use the spectrum on behalf of the public has been affirmed by the Supreme Court.³

Second, under Section 309(j)(7), the FCC may not craft rules for WCS solely to maximize auction revenues. In other words, the Commission should determine what rules for these services would serve the interests of the public, not what rules would bring the most amount of money to the Federal Treasury.

Third, the Act directs the Commission to develop policies that promote competition. For instance, Section 309(j)(3) directs the Commission to

(B) promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.

In its strictest sense, competition is the bedrock policy endorsed by Congress and the President in

² Section 301 states, "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."

³ See, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

the Telecommunications Act of 1996.

Within these constraints, however, the Act vests the FCC with broad authority to design spectrum policies according to its view of the public interest. This discretion is particularly broad in the context of new technologies. Section 303 states that “the Commission from time to time shall-- . . . (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest”. Section 309(j)(3) directs the Commission, when establishing its auctions rules, to “seek to promote . . . (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public . . .” Section 7 of the Act establishes the general policy of the United States “to encourage the provision of new technologies and services to the public.”

III. Allowing WCS Licensees Greater Flexibility May Be Worth Exploring.

The FCC has proposed that “a WCS licensee [may] use this spectrum for any use permitted within any of the allocation categories of fixed, mobile, radiolocation, and broadcasting-satellite services, subject to international requirements and coordination.” (Notice, para. 9.) In other words, the FCC proposes to allow the WCS licensee greater flexibility than usual to determine on its own which services to provide over this spectrum.

Providing WCS licensees with this flexibility could be a reasonable approach for several reasons. First, this spectrum could be used for several different services. The FCC is understandably reluctant to determine in advance how this spectrum can be used most efficiently and which services will bring the greatest benefit to consumers. Second, this spectrum is not currently being used to provide commercial services. As a result, the FCC may consider changes to its traditional spectrum policies to allow greater flexibility without disrupting existing services

to consumers.

Third, even though these frequencies are not being used for commercial services today, consumers can receive services similar to those that may be provided over the WCS spectrum from other firms using other frequencies. In other words, the cost of experimenting with WCS is low because the WCS spectrum is not the only source for the proposed services.

IV. Factors Affecting WCS Licensing

While there are several reasons for the FCC to consider allowing WCS licensees greater flexibility, there are also several issues that the FCC must evaluate carefully before moving forward with this proposal.

First, before deciding how much spectrum to allocate for each licensee, how many WCS licenses to issue, and the geographic scope of each license, the FCC should review the effect of each proposal on competition in related sectors of the industry. Competition would not be enhanced, and consumers would not be served, if the rules the Commission develops in this proceeding give the WCS licensee an unfair and artificial advantage over existing providers. In conducting this analysis, the FCC should seek to promote competition, not to protect individual competitors. Of course, any analysis of competition must also include an analysis of the rules governing existing competitors.

For instance, before authorizing a single, nationwide licensee to use the entire 30 megahertz available in this proceeding (should the Commission decide to follow this route), the Commission should consider the effect on existing cellular and PCS licensees whose license areas are restricted to certain geographic areas and certain spectrum.

The FCC should in particular consider the effect of various licensing rules for WCS on

the PCS licensees. Many PCS companies received their licenses last year and are in the midst of obtaining financing and building their systems. Others are continuing to bid in the auctions for the D, E, and F PCS licenses and will continue to seek financing in the market after the auctions are completed. The FCC should consider the effect on the existing and future PCS licensees before reaching any final conclusions in this proceeding concerning the licensing rules for use of the WCS spectrum.

In addition to reviewing the effect on competition in the mobile services market, the FCC should also evaluate the effect of the WCS licenses on competition in the fixed, radiolocation and broadcasting markets before reaching any conclusions on the number and size of the WCS licenses. If the FCC decides to allow the WCS licensee to have the flexibility to offer fixed, radiolocation and broadcasting services as well as mobile services, the FCC should also consider the effect of its WCS rules on competition and consumers in every one of these service categories.

Second, the Commission proposes to allow licensees to partition their service territories and to disaggregate their spectrum into smaller blocks of spectrum “*through a transfer of FCC license authority*,” (Notice para. 16, emphasis added). This proposal raises potential conflicts under the provisions of the Act that prohibit the licensee from owning the spectrum. CPI is concerned that this proposal would allow the FCC to delegate too much of its public interest authority to private companies. CPI prefers the Commission’s suggested franchise approach, under which a licensee is permitted to assign responsibility for building the facilities or providing a portion of the service to another as long as the licensee retains ultimate responsibility. Again, the Commission must ensure that every user of the spectrum is responsible to the FCC and to the

public.

Third, the Commission proposes no eligibility restrictions for WCS licenses and asks for comment on the applicability of the spectrum “cap” of 45 MHz for certain Commercial Mobile Radio Services (CMRS) licensees.⁴ CPI is concerned that the lack of any ownership limits on WCS spectrum could undermine the pro-competitive goals established by Congress and endorsed by the Commission in other proceedings. The Commission states in the Notice that “We anticipate that the most likely uses of WCS will be to provide a mix of fixed and mobile services similar to other services currently operating on a subscription basis.” (Notice, para 14.) If WCS licensees do, in fact, provide mobile services, it would appear to be inequitable to allow CMRS licensees to acquire the WCS license and use more than 45 MHz while those CMRS licensees who do not acquire the WCS license continue to be restricted by the 45 MHz “cap”.

CPI agrees with the Commission’s concern that some entities may try to aggregate spectrum to obtain a dominant position in the CMRS marketplace. (Notice, para. 25) In the pending proceeding concerning eligibility for Local Multipoint Distribution Services (LMDS), CPI advocates restrictions that prevent an incumbent cable operator and an incumbent local

⁴ CPI takes this opportunity to point out two additional issues raised but not discussed in the FCC’s Notice concerning foreign ownership eligibility. The Commission states, “We propose that there be no restrictions on eligibility for a WCS license, other than those foreign ownership restrictions set forth in Sections 310(a), 310(b)(1) and 310(b)(2).” (Notice, para. 23.) This statement excludes any reference to Sections 310(b)(3) and (b)(4), which limit the FCC’s authority to grant a license to any corporation with 20% or 25% foreign ownership. The Commission does not indicate why these two provisions would not apply to WCS licenses. The FCC’s proposed rules, attached to the Notice, appear to resolve this issue but also create an additional issue. Proposed rule section 27.302 would limit foreign ownership in a manner identical to Section 310(b), including (b)(3) and (b)(4). The proposed rule, however, only prohibits foreign ownership of a WCS authorization to provide CMRS and would appear not to bar foreign ownership of a WCS license to provide broadcast or other common carrier services.

exchange carrier from acquiring the LMDS license in the same geographic area where they provide service. In its comments in the LMDS proceeding, CPI expressed concern that the incumbent cable operator or incumbent local exchange carrier may have diminished incentives to develop the full potential of the LMDS technology, particularly since the Commission is proposing to award only one LMDS license per market.

CPI believes that the Commission should engage in further analysis of whether eligibility restrictions or the spectrum “cap” should apply to the WCS license. The answer may depend, in part, on whether the Commission decides to award one or several WCS licenses per market and whether the WCS licensee provides fixed, mobile or other services. The issues concerning the spectrum “cap” may also be influenced by the FCC’s plans to award additional licenses in the near future using other frequencies that may be used to provide similar services.

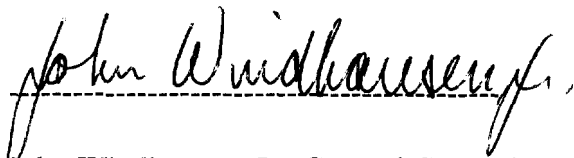
Conclusion

CPI believes that the FCC’s tentative proposal to allow WCS licensees to have the flexibility to provide a variety of services may have some consumer benefits. For the Commission to limit the scope of services that could be provided using this spectrum might unduly limit the number and type of services that could be provided in an efficient manner over this spectrum, with a resulting loss of consumer welfare.

At the same time, the Communications Act imposes some constraints on the FCC’s authority to allow greater spectrum flexibility. The Commission must ensure that the WCS provider does not own the spectrum and is accountable to the general public and the FCC. The Commission should not delegate its public interest responsibilities completely to private entities. The Commission may not design the rules for WCS licenses solely to maximize auction

revenues. The Commission should analyze the effect of its WCS rules on competition in those markets offering services similar to those that could be offered using the WCS spectrum. Only by conducting such an analysis of each of the industries that are potentially implicated by WCS can the Commission ensure that competition is enhanced. Finally, the Commission should examine closely its ownership eligibility restrictions and the applicability of the spectrum "cap" to the WCS licensee. The FCC must ensure that its policies are fair and competitively neutral. Only then will the FCC have satisfied its obligation to award licenses in the public interest.

Respectfully Submitted,

A handwritten signature in cursive script, reading "John Windhausen, Jr.", written over a horizontal dashed line.

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